

US Version International Version Combined Version

SEARCH

[SUPPORT JURIST](#) | [ABOUT JURIST](#) | [HOME](#)

FORUM

RSS FEED

SUBMISSIONS

Op-eds on legal news by law professors and JURIST special guests...

E-mail **Forum** submissions (about 1000 words in length - no footnotes please) to academiccommentary@jurist.org

Second Circuit's Decision Provides Unique Window Into Enemy Combatant Decisions

JURIST Guest Columnist **Jeffrey Addicott** of St. Mary's University School of Law says that the Second Circuit's opinion upholding the conviction of alien enemy combatant Ghailani offers a unique view into how a federal appeals court grapples with the legal complexities existing between law of war concerns and domestic criminal processes ...

LATEST OP-EDS

- ▶ **The Interplay of Direct and Indirect Democracy at Work in Croatia's Battle Over the Rights of Same-Sex Couples**
January 23, 2014
- ▶ **NSA Metadata Collection: Fourth Amendment Violation**
January 15, 2014
- ▶ **NLRB v. Noel Canning Presents a Non-Justiciable Political Question**
January 6, 2014
- ▶ **Iraqi Constitutional Division**
December 28, 2013
- ▶ [click for more...](#)

Get JURIST legal news delivered daily to your e-mail or RSS reader!

CONTACT

JURIST and our op-ed authors welcome comments and reactions from readers. E-mail us at JURIST@jurist.org



In October 2013, when the US Court of Appeals for the Second Circuit **upheld** the conviction of alien enemy combatant and ex-Guantanamo detainee Ahmed Khalfan Ghailani, the sigh of relief from the Obama administration could be heard throughout the Holder Justice Department. Reflecting the Obama administration's schizophrenic approach to prosecuting enemy combatants—whether to try them as criminals in a federal court or as enemy combatant war criminals in a military commission—the case was an early lightning rod. Flying in the face of common sense and the rule of law associated with warfare, President

Obama had **ordered** Ghailani taken from an ongoing military commission trial at **Guantanamo Bay**, flown to New York, and tried as a common criminal in a federal district court. Nevertheless, whether one is a critic or admirer of Obama's penchant for the federal court process for enemy combatants, given the fact that Ghailani was **found guilty** in a 2010 jury trial on only a single count (conspiracy to destroy US buildings and property, in violation of **18 USC § 844**) out of 282 counts, it was most gratifying that the Second Circuit upheld his conviction.

The Ghailani case is particularly instructive because it not only demonstrates the levels of confusion and consternation associated with how the Obama administration strives to bring al Qaeda enemy combatants to justice, but the case reveals the obvious "discomfort" that federal judges encounter when mixing law of war concerns with domestic criminal processes.

Ghailani was part of a successful 1998 al Qaeda terror attack on two US embassies in Africa. The simultaneous bomb attacks in Kenya killed two hundred and thirteen people and injured about 4,000 others. Since these al Qaeda attacks occurred prior to **9/11** the US operated under the rule

of law which treated such "terrorists" as criminals to be arrested and prosecuted in federal court for applicable crimes. Accordingly, Ghailani and several other al Qaeda operatives were indicted on various criminal charges on December 16, 1998. While several of Ghailani's companions were convicted in the US District Court for the Southern District of New York, Ghailani was able to elude arrest for six years. He was finally captured in July of 2004. Because the US was now in a state of war with al Qaeda per the 2001 **Authorization for Use of Military Force**, Ghailani was logically designated as an enemy combatant. In turn, because of his intelligence value, Ghailani was held for approximately two years by the Central Intelligence Agency at an off-site location. Then, in September 2006 Ghailani was sent to the military detention facility at Guantanamo Bay, Cuba.

In accordance with the 2004 ruling in **Hamdi v. Rumsfeld**, a 2007 Combatant Status Review Tribunal (CSRT) reviewed Ghailani's status and affirmed his designation as an "enemy combatant." Understanding that under the law of war enemy combatants may be detained indefinitely until the war is concluded, it was not until March 2008 that the government formally **charged** Ghailani with violations of the law of war and began the process of prosecuting him before a military commission.

Then, on January 22, 2009, shortly after being sworn into office, President Obama **issued** three executive orders that reflected his political desire to reverse or deny the general theme that the law of war should be the predominate legal tool employed to deal with al Qaeda enemy combatants. Obama ordered: (1) the closure of Guantanamo Bay within one year; (2) the suspension of the use of new military commissions; and (3) the suspension of the CIA's enhanced interrogation program. In quick step, in June 2009, the Holder Justice Department used Ghailani as its test case for the notion that the military commission process should be secondary to the use of the federal court system to prosecute designated al Qaeda enemy combatants. (It is well established that the many domestic jihadists in the US are never candidates for the law of war rule of law in terms of detention, interrogation, and trial.) Indeed, this notion entered the surreal when later in 2009, Holder **announced** that five of the most senior members of al Qaeda8#212;Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin Al Shibjh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi8#212;would be transferred from military custody in the detention facility at Guantanamo Bay to stand trial in domestic federal criminal court in the Southern District of New York for their roles in the 9/11 attacks. While universal public outcry from the American people and the Democrat-controlled Congress forced Holder to **reverse** his ill-conceived decision regarding Khalid Sheikh Mohammed and the four other senior al Qaeda leaders, the Ghailani case went forward. At least supporters could attempt to justify the decision to send Ghailani to federal court by pointing to the fact that the Ghailani terror attacks occurred before 9/11.

The main thrust of the Ghailani appeal to the Second Circuit was that the delay outlined above was a violation of the Speedy Trial Clause of the **Sixth Amendment**. In ruling that the five-year delay in bringing Ghailani to trial did not violate the Speedy Trial Clause, the court used the well-established four factor test: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right in the run-up to the trial; and (4) whether the defendant was prejudiced by

the failure to bring the case to trial more quickly. In balancing these factors, the court acknowledged that Ghailani was not simply a common criminal but was in fact and "alien enemy combatant." This fact clearly overshadowed the analysis. Indeed, the court found that "there was no evidence that the government ever acted in bad faith" but was in fact operating under the assumption that Ghailani was to be tried by military commission until President Obama decided to pursue trial in a federal court. While the court stated that it was troubled by the length of the delay process in total, given the national security interests and the fact that the US was dealing with an enemy combatant the balance of the four factors favored the government.

In conclusion, the Second Circuit's opinion provides a unique window into how a federal appeals court deals with legal issues that exist in a world set in the twilight between the law of war and domestic criminal law. As long as the Obama administration continues to use domestic criminal law to prosecute enemy combatants, the legal "no man's land" will certainly continue.

Jeffrey Addicott is a Professor of Law and Director of the Center for Terrorism Law at St. Mary's University School of Law in San Antonio, Texas. He is an internationally recognized authority on national security law, terrorism law and human rights law. Addicott pioneered the teaching of law of war and human rights courses to the militaries of nascent democracies in Eastern Europe and Latin America. Prior to teaching, he served as the senior legal advisor to the United States Army's Special Forces.

Suggested citation: Jeffrey Addicott, *Second Circuit's Decision Provides Unique Window Into Enemy Combatant Decisions*, JURIST - Forum, Nov. 26, 2013, <http://jurist.org/forum/2013/11/jeffrey-addicott-ghailani-combatant.php>.

This article was prepared for publication by **Michael Kalis**, an associate editor for JURIST's academic commentary service. Please direct any questions or comments to him at academiccommentary@jurist.org

November 26, 2013

[Link](#) |  [SHARE](#) | [print](#) | how to [subscribe](#) | © JURIST

© JURIST Legal News and Research Services, Inc., 2013. JURIST is a 501(c)(3) non-profit organization. E-mail inquiries, changes, news tips, URLs, corrections, etc. to JURIST@jurist.org. This site is not an official site of the University of Pittsburgh. The University of Pittsburgh is not responsible for its content. Nothing on this site is intended as legal advice. If you have a legal problem, please consult an attorney. ■